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Supreme Court, U.S.
FILED
OCT 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD P. KUNTZ, et al.,

Petitioners,

vs.

NAT J. REESE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES, AS REQUIRED BY RULE 34, AND OF AFFILIATED COMPANIES AS REQUIRED BY RULE 28.1

Plaintiffs-Petitioners:

Richard P. Kuntz,
Dan Caccavo,
Jimmy J. Humes,
Gursewak Singh,
Duane White,
John W. McCord,

Defendants-Respondents:

Nat J. Reese,
Daniel J. Eget,
Sammy Narens,
Danat Investments,
Capitol Metals Co., Inc.
a California corporation,
Capitol Metals Enterprises, Inc.,
Capitol Metals Co., Inc.,
Northern California Division,
Gibraltar Metals Corp.,
Metal Transport, Inc.,
Capitol Metals Co., Inc.,
a Delaware corporation,
formerly named Newco-Estel,
Inc. and sued herein as
Estell Corporation,

The affiliated companies are parties to the lawsuit.

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No. _____

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RICHARD P. KUNTZ, ET AL,

Plaintiffs-Petitioners,

v.

NAT J. REESE, ET AL,

Defendants-Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

The defendants respond as follows to the Plaintiffs' Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Statement of the Case appearing in the petition is in general accurate. The first sentence of the Statement of the Case indicates,

however, that during their employment by defendants, all plaintiffs were participants in the pension plan at issue. This is contrary to the facts and to the allegations of the complaints. Both the original and the first amended complaints alleged some of the plaintiffs never became participants in the pension plan. Complaint at 4, lines 12-14; First Amended Complaint at 6, lines 12-13 and 23-25, and at 7, lines 6-7.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals correctly determined the plaintiffs have no standing to sue under ERISA because they are not "participants" as

defined in 29 U.S.C. § 1002(7). The plaintiffs are not participants because they have already received, by lump sum distribution, all benefits to which they are entitled under the pension plan at issue. The plaintiffs' claims that the defendants misrepresented the quality of the pension plan do not confer standing on the plaintiffs.

Because plaintiffs are not participants, they are not entitled to invoke federal jurisdiction under ERISA. The weight of authority holds that the jurisdictional grant of § 1132 is exclusive, and that result best comports with this Court's stated

reluctance to give expansive construction to a statute as comprehensive and carefully crafted as ERISA. Nor can plaintiffs sue under the federal common law of ERISA, because the Court has held that actions by parties in the position of plaintiffs do not "arise under" ERISA for jurisdictional purposes.

The Ninth Circuit's failure to request an answer to defendants' petition for rehearing did not violate Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 does not require that an answer be requested. Moreover, plaintiffs were not prejudiced by the Ninth Circuit's failure

to request an answer because: (1) the court was very familiar with the plaintiffs' arguments, having adopted those arguments in its first opinion, and thus presumably had the arguments in mind when it ruled on defendants' petition for rehearing, and (2) the plaintiffs' arguments were made, considered again, and rejected when the plaintiffs petitioned for a rehearing after the Ninth Circuit issued its second opinion.

1. THE COURT OF APPEALS CORRECTLY DETERMINED THE PLAINTIFFS LACKED STANDING TO SUE UNDER ERISA.

The plaintiffs have a right to sue under ERISA only if they are "participants." 29 U.S.C. § 1132. A "participant" is defined in 29 U.S.C. § 1002(7) as:

> any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . . (Emphasis added.)

The plaintiffs in this case are former employees of Capitol Metals Co., Inc., which was sold to the Estell defendants. The Reese defendants were formerly the shareholders of Capitol Metals Co. The pension plan which formerly covered the

plaintiffs was terminated and the assets distributed to those who were participants in the plan, including plaintiffs. Thus, the employer no longer exists, the pension plan no longer exists, and the plaintiffs are no longer employed by their former employer.

The Court of Appeals for the Ninth Circuit therefore held that because the plaintiffs' benefits were distributed to them before they brought suit, plaintiffs do not qualify as participants as defined in § 1002(7). Kuntz v. Reese, 785 F.2d 1410, 1411-12 (9th Cir. 1986). The plaintiffs will never "become eligible to receive a benefit" from the pension plan, the Ninth Circuit reasoned.

The Ninth Circuit's decision is consistent with the interpretation given the word "participant" by the Department of Labor, the agency charged with administering ERISA. In its regulations the Department of Labor has determined:

> (ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if --
>
> . . . .
>
> (B) The individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

29 C.F.R. § 2510.3-3(d)(2)(ii)(B) (1985). In another regulation, the Department of Labor excluded from the definition of "participant" any person

"to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2610.2 (1985).

Although this Court is the ultimate authority in determining the intent of Congress in enacting ERISA, the Department of Labor's interpretation of the word "participant" is persuasive and is entitled to substantial deference. Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 2782-83, 81 L.Ed. 2d 694 (1984). That interpretation makes it clear that the plaintiffs in this case are not participants and therefore have no standing to bring this action.

The Ninth Circuit's decision in this case is also consistent with the decisions of the other circuit courts that have confronted the issue. In Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628 (5th Cir. 1985), cert. denied, 106 S.Ct. 526, the plaintiffs sued the trustees of a pension plan for breach of their duties under ERISA. All plaintiffs had retired before 1981 and had elected to receive a lump sum distribution of their retirement benefits rather than a continuing monthly benefit. In July 1981 the trustees voted an eightfold increase in the monthly benefits, thus creating a marked disparity between those who accepted a lump sum distribution on retirement and those who accepted a

continuing monthly benefit. Moreover, the trustees permitted lump sum retirees who had retired after January 1, 1981 to take advantage of the benefit increase but not lump sum retirees who had retired before January 1, 1981.

The Court of Appeals for the Fifth Circuit held the plaintiffs had no standing to bring the lawsuit because they were not "participants" as defined in 29 U.S.C. § 1002(7). Because the plaintiffs had already been paid the benefits owing to them under the pension plan, they were not persons who "may become eligible to receive a benefit," reasoned the court:

> To be a "participant," a person must have either a present or a future right to benefits under the pension or retirement plan. This excludes retirees who have accepted the payment of everything due them in a lump sum, because

> these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Such retirees have no present or future right to Plan funds, and the Plan no longer has any obligations to these individuals. This is consistent with prior Fifth Circuit decisions limiting the "may-become-eligible" phrase to current employees, and to former employees with currently vested benefits, as well as with Department of Labor regulations pertaining to the administration of ERISA. Those regulations specifically exclude from the definition of "participant" "an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan." The interpretation of a statute by the agency charged with its administration is entitled to substantial deference.

754 F.2d at 630 (footnotes omitted.)

Accord, Jackson v. Sears Roebuck & Co., 648 F.2d 225, 228-29 (5th Cir. 1981); Nugent v. Jesuit High School of

New Orleans, 625 F.2d 1285 (5th Cir. 1980).

In Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473 (2d Cir. 1985), the plaintiff, a former member of the union, requested a copy of the union pension plan. The request was refused because plaintiff would not become eligible for benefits because he had ceased union employment at age 53, whereas the plan required that employees work until a later age in order to qualify for a pension. Plaintiff filed a lawsuit to require compliance with ERISA's disclosure requirements and to obtain the $100 per day penalties provided by 29 U.S.C. § 1132(c). The lawsuit was settled and plaintiff thereafter made a motion for attorneys' fees under 29

U.S.C. § 1132(g). That section gives the court discretion to award attorneys' fees in an action brought "by a participant." The district court denied the request for fees on the ground that plaintiff was not a participant. The Court of Appeals for the Second Circuit affirmed, saying:

> We believe that participant is limited to either employees in, or reasonably expected to be in, currently covered employment or former employees with a colorable claim to vested benefits. This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits "may become eligible." A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the term "may become eligible."

Our view, moreover, is the only one consistent with the role accorded by the statutory scheme to those who fall within the term participant. The mandatory requirement that plans send certain documents at specified intervals and annual financial information to participants strongly suggests that this group must be easily identifiable and one with a substantial interest in the matters conveyed. Current employees or those reasonably expected to become such and persons with a colorable claim to vested benefits are in that category. Expansion of the group to former employees of many years past or others with no colorable claim to benefits would create uncertainties as to statutory obligations and impose great costs on pension plans for no legislative purpose. Similarly, the provision that plans inform participants who so request of their accrued and nonforfeitable benefits implies that the persons entitled to such disclosure have a demonstrable claim. We believe, therefore, that Congress intended the term participant to limit the various reporting and disclosure obligations imposed on plans to identifiable persons with a substantial interest in the matters conveyed and not to burden plans with the cost of reporting and

> disclosing to an amorphous, undefined group of individuals who lack any such interest. Any other reading of the statute would reduce the amounts available to actual beneficiaries of plans for no statutory purpose.

754 F.2d at 476.

Not only is the Ninth Circuit's decision in this case consistent with the Department of Labor's regulations and the decisions of other circuit courts that have been called upon to determine the meaning of "participant," the decision is also consistent with other Ninth Circuit decisions that have confronted the issue. See Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1985); Weiss v. Sheet Metal Workers Local 544 Pension Trust, 719 F.2d 302 (9th Cir. 1983),

cert. denied, 466 U.S. 972, 104 S.Ct. 2347, 80 L.Ed. 2d 821 (1984); Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust, 662 F.2d 617 (9th Cir. 1981).

Neither their original complaint nor their first amended complaint alleged the plaintiffs are or may become eligible for benefits from the pension plan. Rather, the complaints allege that defendants made certain misrepresentations about how "good" the plan was and that the plaintiffs are entitled to penalties for defendants' failure to furnish certain plan documents as requested by plaintiffs. These claims are for damages and penalties, not for benefits from a pension plan. If the plaintiffs had standing to pursue the claims, and if

plaintiffs prevailed upon them, the court would not award plaintiffs benefits from a pension plan; the court would instead award damages and impose penalties, neither of which would come from a pension plan which is no longer in existence.

Therefore, plaintiffs' claims in this lawsuit do not make them eligible to receive a benefit from a pension plan. Plaintiffs do not dispute that they received all benefits to which they were entitled under the plan as it existed at the time of termination. They simply claim the benefits actually provided by the plan did not live up to the representations allegedly made by defendants. Such

claims of misrepresentation do not confer standing on the plaintiffs.[1/] In Freeman, supra, the plaintiff, a former employee of the defendant, sued

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[1/] The plaintiffs claim at pages 42 to 44 of their Petition that McKnight v. Southern Life and Health Insurance Co., 758 F.2d 1566 (11th Cir. 1985), suggests the remedy for misrepresentations about a pension plan may take the form of benefits under the plan. Therefore, the argument goes, a suit for damages to redress such alleged misrepresentations may be considered as an action seeking benefits under the plan. Since, under this reasoning, their lawsuit may result in an award of benefits, the plaintiffs claim they "may become eligible" to receive a benefit and are thus participants under ERISA. This argument not only defies common sense and ignores contrary authority, e.g., Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1985), it also incorrectly summarizes the holding of McKnight.

There the plaintiff, a retired employee who was receiving monthly

claiming the employer's misrepresentations had caused the plaintiff to waive participation in the pension plan. The Ninth Circuit held the plaintiff was not a participant because he would not "become eligible to receive a benefit . . . from an employee benefit plan . . . ." The court said:

> At most, this court, or any court for that matter, could award Freeman the damages caused by the alleged fraud. This is different

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benefits from an existing pension plan, sued to recover a larger benefit. The plaintiff claimed his benefit had been computed incorrectly in that he had not been given credit for employment that preceded a break in service. The court did not hold that an award of benefits could be given as a remedy for misrepresentations. Indeed, no claim of misrepresentation was even made. The court simply found the plan at issue had been misinterpreted by the employer and that the plan in fact provided for the benefits the plaintiff claimed.

> from awarding him a "benefit under a plan." If it were not, then any plaintiff who could argue a colorable claim would be a participant, since a victorious law suit would award them a "benefit." We do not feel Congress intended to open the door to this kind of plaintiff when ERISA's jurisdictional provisions were drafted.

721 F.2d at 656.

Apparently conceding they were not participants when they filed their lawsuit, plaintiffs next claim the determination of whether or not they are participants should be made with reference to the time when the alleged wrongs occurred. Petition at 25. That argument was rejected by the Fifth Circuit in Yancy v. American Petrofina, Inc., 768 F.2d 707 (5th Cir. 1985). There the plaintiff was notified that a change would be made

in the manner in which lump sum retirement benefits would be computed. The change would have had the effect of reducing the amount of the lump sum payment. Before the change went into effect, the plaintiff elected to retire early so his benefits would be calculated under the former method of computation. On his early retirement election form the plaintiff wrote the words "under protest."

Thereafter, the plaintiff sued his former employer for breach of fiduciary duty. The Fifth Circuit held the plaintiff lacked standing because he had already received a lump sum distribution and therefore would not become eligible to receive benefits from the plan. 768 F.2d at 708. The court said:

> Yancy contends that he does have standing to bring this suit because he was a participant when the interest change was announced in January 1982. However, questions of standing must be resolved on the facts existing when the challenge is raised. Safir v. Dole, 718 F.2d 475, 481 (D.C. Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2389, 81 L.Ed. 2d 864 (1984).

768 F.2d at 708. Accord, Brink v. DaLesio, 667 F.2d 420, 427 (4th Cir. 1981); Senter v. General Motors Corp., 532 F.2d 511, 520 (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976); Russell v. New Amsterdam Casualty Co., 325 F.2d 996, 998 (8th Cir. 1964); Janzen v. Goos, 302 F.2d 421, 424 (8th Cir. 1962)(per Blackmun, J.).

Plaintiffs predict various forms of abuse by employers if former employees are not considered parti-

cipants for jurisdictional purposes. They claim employers could commit breaches of fiduciary duty and then either terminate the aggrieved employees or terminate the pension plan in order to immunize the employer from responsibility for the breaches. Petition at 18-19. In such an event the employees would have no remedy, the plaintiffs claim, because the employees cannot sue under ERISA and their state law claims are preempted by ERISA.

The plaintiffs' predictions of dire consequences flowing from the Ninth Circuit's decision in this case are without foundation. First, it is by no means clear that the kinds of claims pursued by the plaintiffs here

are preempted by ERISA. If they are not, victims of abuse will obviously have a remedy even if it is not provided by ERISA. The remedy will simply arise from state rather than federal law. Second, even if the state claims are preempted by ERISA, ERISA provides many protections against and remedies for the abuses feared by plaintiffs.

In Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, modified 791 F.2d 799 (9th Cir. 1986), the court held that a claim similar to that made here was not preempted by ERISA. The plaintiffs in Martori Bros. charged their employer with refusing to bargain in good faith. The California Agricultural Labor Relations Board entered a "make whole"

order, as permitted by California Labor Code § 1160.3, requiring the employer to pay damages computed as the difference between the fringe benefits actually received by the plaintiffs and the fringe benefits they would have received if the employer had bargained in good faith.

The employer sued in federal court to enjoin the payment, claiming that California Labor Code § 1160.3 was preempted by ERISA insofar as it purported to allow "make whole" orders calculated by reference to fringe benefits covered by an ERISA employee benefit plan. The Ninth Circuit held the "make whole" order did not award ERISA benefits but simply awarded damages calculated by making reference to ERISA benefits. This relation to

an ERISA plan was too tenuous and remote to hold that the statute permitting the "make whole" order was preempted by ERISA, said the court. 781 F.2d at 1358-59.

Even if claims like those made by the plaintiffs were preempted by ERISA, the plaintiffs' fears are unfounded. 29 U.S.C. § 1140 prevents an employer from discharging, disciplining, or discriminating against an employee in retaliation for the employee's exercise of rights under an ERISA plan or to interfere with the employee's attainment of rights under such a plan. Thus, § 1140 gives the discharged employee a remedy. Moreover, section 1140 specifically provides, "The provisions of Section

1132 of this title shall be applicable in the enforcement of this section." If § 1132 empowered former participants to bring suit, it would not have been necessary to include this enforcement provision in § 1140. In doing so, Congress expressly and specifically recognized a limited exception to the "participant" standing requirements of § 1132, and provided employees subjected to retaliatory discharge, who do not fall within the statutory definition of "participant", the right to bring suit. In this case, of course, plaintiffs make no claim that they were wrongfully terminated, or even that they were terminated at all.

ERISA also protects against the plaintiffs' fear that employers will commit breaches and then terminate their pension plans to insulate themselves from liability. To protect against this sort of abuse Congress provided elaborate safeguards, including various provisions for notice of plan termination and a determination by the Pension Benefit Guaranty Corporation that the plan assets are sufficient to pay all benefits owed (29 U.S.C. § 1341 et seq.), plan termination insurance (29 U.S.C. § 1301 et seq.), claims procedures (29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1 (1975)), investigative authority in the Secretary of Labor (29 U.S.C. § 1134), requests to the Secretary of Labor to

exercise his or her enforcement authority (29 C.F.R. §2560.502-1 (1975)), criminal penalties for preventing the exercise of ERISA rights (29 U.S.C. § 1141), etc.

Congress may well have concluded the above safeguards were sufficient to protect against the kind of fraudulent plan terminations the plaintiffs fear. Moreover, this Court need not address in this case the remedy provided if an employer terminates a plan in bad faith for the purpose of insulating himself from liability for breaches of fiduciary duty. That did not happen in this case and plaintiffs do not allege that it did.

The circuit courts that have been confronted with the issue have uni-

formly and correctly determined that persons who have received lump sum distributions of their benefits lack standing to sue under ERISA. The regulations of the Department of Labor provide the same. There is therefore no compelling reason for this Court to add its voice to those that have already spoken on the issue. The petition for certiorari should be denied.

2. BECAUSE THEY ARE NOT PARTICIPANTS, PLAINTIFFS CANNOT INVOKE FEDERAL JURISDICTION UNDER ERISA

Plaintiffs make two separate, but related, arguments in an attempt to show that even if they are not participants under § 1002(7) they are entitled to sue under ERISA. Their

first argument is that there is a "substantial and material conflict" among the Courts of Appeal as to whether the grant of jurisdiction in § 1132 extends only to participants and the other parties explicitly listed there. Petition at 11-16. However, the conflict to which plaintiffs refer is not a "substantial" one and, even if it were, is not "material" to this case.

Plaintiffs base their argument on two Ninth Circuit decisions which hold that even though employers are not specifically listed in § 1132 as having the right to sue under ERISA, they have standing to assert at least some claims. Fentron Industries v. Nat. Shopmen Pension Fund, 674 F.2d

1300 (9th Cir. 1982); Award Service, Inc. v. N. Cal. Retail Clerks Unions, 763 F.2d 1066 (9th Cir. 1985), cert. denied 106 S. Ct. 850, 88 L. Ed. 2d 890 (1986). As plaintiffs point out, the reasoning of Fentron and Award Service has been rejected by the Second and Sixth Circuits and by a district court in a decision affirmed by the Third Circuit. Pressroom Unions Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.) cert. denied, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 138 (1983); Whitworth Bros. Storage Co. v. Cent. States, 794 F.2d 221 (6th Cir. 1986); Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia, 549 F. Supp. 307 (E.D.

Pa. 1982), aff'd, 720 F.2d 661 (3d Cir. 1983). In addition, although not noted by plaintiffs, the Eighth Circuit has affirmed a decision rejecting the Ninth Circuit's reasoning and a district court in the Tenth Circuit has concluded that the Tenth Circuit would reject it as well. Central States v. Admiral Merchants Motor Freight, Inc., 511 F. Supp. 38, 46 (D. Minn. 1980), aff'd, 642 F.2d 1122 (8th Cir. 1981); Blue Cross & Blue Shield of Kansas City v. Bell, 596 F. Supp. 1053, 1058 (D. Kan. 1984). Thus, at least four, and perhaps five, Circuits disagree with the two Ninth Circuit cases on which plaintiffs rely. Such a one-sided conflict is hardly "substantial"

enough to require the intervention of this Court; indeed, this Court has previously declined to review at least two of the conflicting decisions. Award Service, supra, 106 S. Ct. 850, 88 L. Ed. 2d 890 (1986); Pressroom, supra, 464 U.S. 845, 104 S. Ct. 148, 78 L. Ed. 2d 138 (1983).

More important, the conflict on which plaintiffs rely is not "material" here in any event. Fentron and Award Service based their holdings on the supposition that Congress' omission of employers from § 1132, in the absence of legislative history showing it was intentional, did not show an intent to preclude them from suing. 674 F.2d at 1305; 763 F.2d at 1068. Here the situation is much

different. Section 1132 explicitly grants "participants" the right to sue. It does not grant "former participants," such as plaintiffs here, that right. If Congress had intended to confer standing on former members of the class mentioned, it could and would have said so, as it did in § 1002(7) when it expressly defined "participant" to include former as well as current employees. Since it did not do so, § 1132 should be construed in accordance with this Court's observations in Massachusetts Mutual Life Ins. Co. v. Russell, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985):

> The six carefully-integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incor-

> porate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

105 S. Ct. at 3093 (emphasis in original); see also Tuvia Convalescent Center v. National Union, 717 F. 2d 726, 730 (2nd Cir. 1983) and Pressroom, supra, 700 F.2d at 893 (since legislative history is silent, court must conclude that Congress did not intend to expand jurisdiction to cover parties not listed in § 1132).

Thus, the conflict on which plaintiffs rely relates only to whether employers, a class of persons simply not mentioned in § 1132, have standing to sue. In this case, by

contrast, the issue is whether Congress intended the class of "participants," which it did explicitly mention in the statute, to include former participants such as plaintiffs. The conflict, even if it were a substantial one, would not be material to this case and would not justify review by this Court.

Plaintiffs' second argument for jurisdiction notwithstanding their lack of participant status is that their claims are cognizable under the federal common law of ERISA and therefore "arise under" federal law for purposes of 28 U.S.C. § 1331. Petition at 31-36. They assert that "'[I]f a federal cause of action completely preempts a state cause of

action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.'" Id. at 34. In support of that proposition, plaintiffs cite this Court's opinion in Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). However, Franchise Tax Board not only does not support plaintiffs' argument for jurisdiction here, it effectively rebuts it.

In Franchise Tax Board, a state agency charged with enforcement of state tax laws sought a declaratory judgment that ERISA did not preempt it from enforcing state tax levies against a union vacation trust. The trust argued, as do plaintiffs here,

that federal jurisdiction existed under 28 U.S.C. § 1331 because the action "arose under" the federal common law of ERISA. 463 U.S. at 24. This Court rejected the argument. The Court held that even though an action for declaratory relief was properly subject to the federal common law of ERISA, such an action by one not included in the class of persons granted the right to bring such an action under ERISA did not "come within the scope of the federal cause of action" and therefore did not necessarily "arise under" federal law:

> It does not follow . . . that either of appellant's claims in this case comes within the scope of one of ERISA's causes of action.
>
> . . . .

> . . . The question on which a declaration is sought . . . is undoubtedly a matter of concern under ERISA. . . . and thus comes within the class of questions for which Congress intended that federal courts create federal common law. . . . Nevertheless, [the trust's] argument that appellant's second cause of action arises under ERISA fails . . . . ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for relief by some other party does not "arise under" that provision.

463 U.S. at 24-27 (emphasis added; footnotes omitted).

Similarly, in New Jersey State AFL-CIO v. State of N.J., 747 F.2d 891 (3d Cir. 1984), a labor union sought a declaratory judgment that certain state statutes were preempted by ERISA. The court concluded it had no

jurisdiction because the claim did not "arise under" federal law:

> In order for the federal courts to have jurisdiction plaintiff's complaint must show that the case arises under federal law. . . .
>
> . . . .
>
> . . . Even if plaintiff's claim were justiciable, which is questionable, it does not establish that its claim arises under federal law. . . . ERISA does indeed provide that various civil actions may be brought by the Secretary, participants, beneficiaries and fiduciaries . . . . However, only participants and beneficiaries may bring suit (in either state or federal court) to clarify rights to future benefits under the terms of the plan. . . . It is clear from the statute that labor unions are neither participants nor beneficiaries, and consequently plaintiff does not fall within this provision.

Id. at 892-93, citing Franchise Tax Board, supra (emphasis in original; citations omitted).

Thus, the fact that a cause of action is the type of claim which is a proper subject of federal common law does not necessarily mean that anyone asserting the right is entitled to sue in federal court; rather, the claim must "come within the scope of the federal cause of action." Franchise Tax Board, supra, 463 U.S. at 24. If the express terms of the statute creating the right limit the class of persons entitled to assert it, then a suit by some other person does not "come within the scope of the federal cause of action" and consequently does not "arise under" federal law.

For this reason, plaintiffs' reliance on Whitworth Bros. Storage Co. v. Cent. States, 794 F.2d 221 (6th Cir. 1986) is misplaced. Whitworth

held that an employer's suit for restitution of pension plan contributions it made by mistake was properly subject to federal jurisdiction under 28 U.S.C. § 1331. The statute creating the right to restitution of contributions paid by mistake, § 1103(c)(2)(A), did not put any limits on the parties entitled to assert the right. Consequently, the court was willing to infer a congressional intent to extend the right to employers even though employers are not mentioned in the provisions (§ 1132) governing actions under ERISA generally:

> 29 U.S.C. §§ 1103, 1132 express Congress' intent not to favor employers and other parties not named in the statute with a federal statutory cause of action. However, the specific language of the statute, section 403(c)(2)(A)(ii), evinces congressional intent not to

completely preclude employer recovery of mistakenly paid contributions.

Id. at 236 n. 24 (emphasis added). Here, of course, the applicable statutory language not only evinces no intent not to preclude suits by those in plaintiffs' position, it clearly shows Congress intended to limit federal jurisdiction to actions by the parties specifically enumerated. Consequently, actions by other parties do not "arise under" ERISA and are not subject to federal jurisdiction under 28 U.S.C. § 1331. See Franchise Tax Board, supra.

3. NO RESPONSE TO THE PETITION FOR REHEARING WAS REQUIRED AND THE PLAINTIFFS WERE NOT PREJUDICED BY THE NINTH CIRCUIT'S FAILURE TO REQUEST A RESPONSE.

Petitions for rehearing to the United States Courts of Appeals are governed by Federal Rule of Appellate Procedure 40. Under that rule "[n]o answer to a petition for rehearing will be received unless requested by the court, but a petition for a rehearing will ordinarily not be granted in the absence of such a request." Fed.R.App.P. 40(a).

Plaintiffs argue the Ninth Circuit's granting of defendants' petition for rehearing violated Rule 40 because no answer to the petition was requested from the plaintiffs.

But the rule by its terms does not require the court to call for a responsive brief. Instead, the appellate court is given discretion to decide when an opposing argument would be helpful. As a commentary to Fed.R.App.P. 40 states:

> In the very rare instances in which a reply is useful, the court will ask for it.

Fed.R.App.P. 40, Notes of Advisory Committee on Appellate Rules. (See also, Director, etc. v. Cooper Associates, Inc., 607 F.2d 1385 (D.C. Cir. 1979), in which the court cited

to Rule 40 as an example of instances in which reply briefs were "inappropriate." 607 F.2d at 1389, n. 14.)

Plaintiffs argue that the court may only grant a rehearing without asking for a responsive brief in "extraordinary" circumstances. To support this claim, they rely on United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978). The Fifth Circuit in Ludlum granted a rehearing on a motion to award attorney's fees in an employment discrimination suit without asking for a response to the petition. The court withheld action on the petition, awaiting a Supreme Court ruling that decided the same issue. The Fifth Circuit noted that petitions for rehearing are not

"ordinarily" granted without a response, "but a case which the Supreme Court specifically and unanimously notes as having adopted the wrong rule, [citation], is not an ordinary case." 568 F.2d at 1074.

From this, plaintiffs argue that their case was the ordinary one and that a responsive brief by them "would have been of assistance to the court and was necessary to protect the rights gained by plaintiffs in their victory . . . below." Petition at 47. This argument is deficient on two grounds. First, the Ludlum court did not hold that the circumstances present there were the only ones under which a response would be unnecessary. Though Ludlum is the only reported opinion which discusses this

issue, it is certainly not the only factual situation which will obviate the need for a reply when a petition for rehearing is granted. The Ninth Circuit may well have found this to be an extraordinary situation too. Confronted with clearly contrary authority (Joseph v. New Orleans Electrical Pension & Retirement Plan, 754 F.2d 628 (5th Cir. 1985), cert. denied ____ U.S. ____, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985)) and a persuasive Department of Labor regulation, (29 C.F.R. §2610.2), the court obviously realized the wrong result had been reached.

Second, plaintiffs did have a chance to rebut the Reese defendants' petition for rehearing. After the petition for rehearing was granted,

plaintiffs filed their own petition for a rehearing of that decision and made their arguments concerning the points at issue now. In short, plaintiffs did get their day in court and were not harmed by the Ninth Circuit's actions.

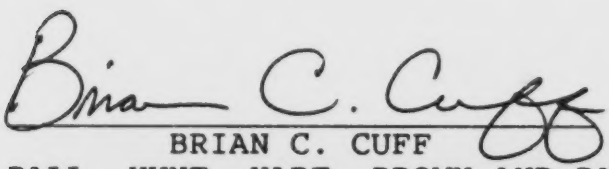
Moreover, at page 39 of their petition for certiorari, plaintiffs claim the Ninth Circuit correctly adopted the plaintiffs' arguments in its first opinion but incorrectly departed from those same arguments when it granted defendants' petition for rehearing. Obviously, the court had the plaintiffs' arguments well in mind when it considered the defendants' petition for rehearing. Allowing the plaintiffs to repeat those arguments in response to

defendants' petition for rehearing would have produced no different result. Therefore, plaintiffs were not prejudiced by the Ninth Circuit's failure to request an answer to defendants' petition for rehearing.

CONCLUSION

For the foregoing reasons, defendants request that the plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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October 1, 1986